

United States 1607
Circuit Court of Appeals
1607
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

JOHN J. FULTON CO., a Corporation, Claimant of 48
Bottles, More or Less, of an Article of Drugs Labeled
in Part "FULTON'S COMPOUND RX 1," and
24 Bottles, More or Less, of an Article of Drugs
Labeled in Part "FULTON'S COMPOUND RX 2,"
Shipped by the JOHN J. FULTON COMPANY,
Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division.

FILED

FEB 23 1920

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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856 Stuart Building, Seattle, Washington.

[1*]

District Court of the United States, Western District of Washington, Northern Division.

No. 12516.

UNITED STATES OF AMERICA,

Libellant,

vs.

48 BOTTLES, More or Less, of an Article of Drugs Labeled, in Part, "FULTON'S COMPOUND RX 1" and 24 BOTTLES, More or Less, of an Article of Drugs Labeled in Part "FULTON'S COMPOUND RX 2," Shipped by the JOHN J. FULTON COMPANY.

*Page-number appearing at the foot of page of original certified Apostles on Appeals.

LIBEL OF INFORMATION.

To the Honorable Court Above Named:

The United States of America, by Anthony Savage, United States Attorney, for the Western District of Washington, respectfully shows:

I.

That libellant above named in its own right prays for the seizure and condemnation of certain articles which may be used either as a food or as a drug, to wit:

48 BOTTLES, more or less, of an article of drugs labeled in part

“FULTON’S COMPOUND RX 1,” and

“24 BOTTLES, more or less, of an article of drugs labeled in part, “FULTON’S COMPOUND RX 2.”

II.

That said libellant is informed and believes, and therefore alleges, that the said 48 BOTTLES, more or less, of an article of drugs labeled in part, “FULTON’S COMPOUND RX 1,” and 24 BOTTLES, more or less, of an article of drugs labeled in part, “FULTON’S COMPOUND RX 2,” hereinabove described, have been shipped from San Francisco, in the State of California, to Seattle, in the State of Washington, via Pacific Steamship Company, arriving at Seattle on or about July 2d, 1928, in interstate commerce via said Pacific Steamship Company, [2] which said shipment is now in the same condition in which it was shipped from San

Francisco, in the State of California, to Seattle, in the Northern Division of the Western District of Washington, and has always remained since said shipment in the same condition in which it is now.

III.

That libellant is informed and believes, and upon such information and belief alleges, that the said 48 Bottles, more or less, of an article of drugs labeled, in part "Fulton's Compound Rx 1," and 24 Bottles, more or less, of an article of drugs labeled in part "Fulton's Compound Rx 2," shipped by John Fulton Company, above described, are misbranded, in violation of the Food and Drugs Act, Paragraph Third, as Amended, in the case of drugs, of Section 8, in that the following statements regarding the curative and therapeutic effect of the articles:

"Fulton's Compound Rx 1—(Bottle label):"

* * * We have received many letters from Physicians reporting in cases * * * of * * * Bright's Disease * * * Albuminuria * * * Nephritis, that the use of this Compound was attended with decrease in the Albumen in the urine, or improvement in the physical condition of the patient, or both. * * * If stomach is weak take half doses until tone of stomach is improved. * * * Write for free copy of the RENAL DIGEST presenting epitomes of many Professional reports * * * ."

(Wrapper) * * * We have received many letters from Physicians reporting in cases

* * * of * * * Bright's Disease * * *
 Albuminuria, * * * Nephritis, that the use
 of this Compound was attended with decrease
 in the albumen in the urine, or improvement
 in the physical condition of the patient, or
 both. * * * "

(Circular) * * * We have received
 many letters from Physicians reporting in cases
 * * * of * * * Bright's Disease * * *
 Albuminaria and * * * Nephritis, that the
 use of this Compound was attended with de-
 crease in Albumen in the urine, or improve-
 ment in the physical condition of the patient,
 or both. We mailed copies of the RENAL
 DIGEST containing epitomes of several hun-
 dred of these reports, with ingredients and
 Rationale, to the Physicians of the United
 States and will mail copies upon application to
 all interested. * * * Where the heart is
 involved or there is dropsy and the patient is
 on helpful heart treatment, elimination or
 tonics it is common practice to advise continu-
 ance of same with the Compound until no
 longer necessary. * * * The late Dr. P.
 ———, of California, who had important ex-
 periences with this treatment, stated he relied
 almost solely on the compound and appropriate
 diet. Another very successful Physician aided
 it by prescribing for the most troublesome symp-
 toms. Both reported good results. * * *
 But from a large mass of correspondence it
 seems probable that a great majority of the

cases were simply on the Compound and diet.
[3]

Patience is necessary for many professional reports do not begin to record decreasing albumen until after the tenth to fifteenth days, the physical improvement gradually following. Occasionally this is reversed, some reports recording physical improvement before the albumen shows much response. Hence as above stated, patience is necessary. Directions. Mild cases * * * More Advanced Cases * * * Advanced or Extreme Cases * * * If stomach is too weak take half doses in a little hot water till full dose can be taken. * * * Test for Albumen Simply formula for making quantitative tests *tests* for albumen, so the changes may be compared, will be mailed free on application. John J. Fulton Co., 88 First St., San Francisco, Cal."

Fulton's Compound Rx2—(Bottle Label):

" * * * We have received many letters from physicians reporting in cases designated therein as DIABETES that the use of this Compound was attended with decrease in the sugar in the urine, or improvement in the physical condition of the patient, or both. * * * If stomach is weak, take half doses until tone of stomach is improved. Write for free copy of the DIABETIC DIGEST presenting epitomes of many Professional reports on the results following the use of this Compound."

(Wrapper): “ * * * We have received many letters from Physicians reporting in cases designated therein as Diabetes that the use of this Compound was attended with decrease in the sugar in the urine, or improvement in the physical condition of the patient, or both.”

(Circular): “ * * * We have received many letters from Physicians reporting in cases designated therein as DIABETES that the use of this Compound was attended with a decrease in the sugar in the urine, or improvement in the physical condition of the patient, or both. We mailed copies of the DIABETIC DIGEST recapitulating and summarizing several hundred of these reports, with ingredients and Rationale, to the Physicians of the United States and will mail copies upon application to all interested. If you desire a copy, sent your address. * * * The late Dr. P. ———, of California, who had important experience with the treatment, stated he relied almost solely on the compound and appropriate diet. Another very successful Physician aided it by prescribing for painful or troublesome symptoms. Both reported good results. * * * But from a large mass of correspondence it seems probable that a great majority of the cases were simply on the Compound and Diet. * * * Patience is necessary, for many professional reports do not begin to record decreasing sugar until after the tenth to fifteenth day, the physical improvement gradually fol-

lowing. Occasionally this is reversed, some reports recording physical improvement before the sugar shows much response. Hence, as above stated, patience is necessary. * * * Mild Cases * * * More Advanced Cases * * * Advanced or Extreme Cases * * * and with same will include instructions for making sugar tests so the changes may be compared. * * * ’’

are false and fraudulent since the article contains no ingredient or combination of ingredients capable of producing the effects claimed. [4]

IV.

That the said 48 Bottles, more or less of an article of drugs, labeled, in part, “Fulton’s Compound Rx 1” and 24 Bottles, more or less, of an article of drugs labeled in part “Fulton’s Compound Rx 2,” shipped by the John J. Fulton Company, hereinabove described, constitutes an interstate shipment from the State of California, in interstate commerce, as above set forth, and that the said 48 Bottles, etc., and the said 24 Bottles, etc., as hereinabove described, are now within the jurisdiction of this Honorable Court in the original unbroken packages.

V.

That the source of the libellant’s information is an official communication by letter, received from the department of Agriculture, Washington, D. C., under date of July 26th, 1928, which said communication is hereto attached by copy marked Ex-

hibit "AA," and made a part of this libel as though set forth herein. [5]

WHEREFORE, in consideration of the premises, your libellant prays that said article, which may be used either as a food or as a drug, consisting of 48 Bottles, more or less, etc., and 24 Bottles, more or less, of Fulton's Compound, as hereinabove described, may be proceeded against and seized for condemnation in accordance with the Act of Congress approved June 30, 1906, and to this end this Honorable Court may issue process of attachment in due form, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, so far as practicable in this case, and that all persons, firms, and corporations having or pretending to have any right, title, or, claim in and to said shipment of drugs above mentioned, may be cited to appear herein and answer all and singular the premises aforesaid, and that if the said persons, firms, or corporations cannot be found, they may be cited to appear by process of publication in the manner provided by law.

That by an appropriate order, this Honorable Court may adjudge and decree that the said articles of food and drugs hereinbefore particularly described and mentioned, be condemned at the suit of this libellant, according to the provisions of the Act of Congress hereinbefore set forth; that this Honorable Court may pass all such orders and decrees and judgments as may be necessary in the premises, and may grant your libellant a decree for the cost of this proceeding against the owners or

holders of said articles condemned, should such costs not be justified out of the proceeds of the sale, and that your libellant may have such other and further relief as the nature of the case may require.

ANTHONY SAVAGE.

ANTHONY SAVAGE,

United States Attorney.

DAVID SPAUDLING,

DAVID SPAULDING,

DAVID L. SPAULDING,

Assistant United States Attorney. [6]

United States of America,
Western District of Washington,
Northern Division,—ss.

E. A. Gray, being first duly sworn, on his oath deposes and says: That he is an inspector of the Bureau of Food, Drug and Insecticide Administration, United States Department of Agriculture, at Seattle, Washington; that he has read the foregoing libel, knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and that as to those matters he believes them to be true.

E. A. GRAY.

Subscribed and sworn to before me this 1st day of August, 1928.

[Seal]

S. COOK.

Deputy Clerk, U. S. District Court, Western District of Washington. [7]

EXHIBIT "A."

DEPARTMENT OF AGRICULTURE,

Washington, D. C.

In reply refer to

F. & D. No. 22928.

Jul. 26, 1928.

Hon. Anthony Savage,

United States Attorney,

Seattle, Washington.

Sir: There are at Seattle, in the possession of Stewart & Holmes Drug Company, 48 bottles, more or less, of an article of drugs labeled in part, "Fulton's Compound Rx 1" and 24 bottles, more or less, of an article of drugs labeled in part "Fulton's Compound Rx 2," shipped by the John J. Fulton Company from San Francisco, California, on or about July 2, 1928, via the Pacific Steamship Company.

Analyses of samples of these articles show that they consist essentially of sodium and calcium borate, nitrate and sulphate, extracts of plant drugs including licorice uva ursi and a laxative drug, salicylic acid, alcohol (8%) and water (90%).

Each of the articles is misbranded in violation of the Food and Drugs Act, paragraph third, as amended, in the case of drugs, of Section 8, in that the following statements regarding the curative and therapeutic effect of the article are false and fraudulent, since the articles contain no ingredi-

ent or combination of ingredients capable of producing the effects claimed:

Fulton's Compound Rx 2—(Bottle label):

“ * * * We have received many letters from physicians reporting in cases designated therein as DIABETES that the use of this Compound was attended with decrease in the sugar in the urine, or improvement in the physical condition of the patient, or both. * * * If stomach is weak, take half dose until tone of stomach is improved. Write for free copy of the DIABETIC DIGEST presenting epitomes of many professional reports on the results following the use of this Compound.”

(Wrapper): “ * * * We have received many letters from Physicians reporting in cases designated therein as Diabetes that the use of this Compound was attended with decrease in the sugar in the urine, or improvement in the physical condition of the patient, or both.”

(Circular): “ * * * We have received many letters from Physicians reporting in cases designated therein as DIABETES, that the use of this Compound was attended with a decrease in the sugar in the urine, or improvement in the physical condition of the patient, or both. We mailed copies of the DIABETIC DIGEST recapitulating and summarizing several hundred of these reports, with ingredients and Rationale, to the Physicians of the United States and will mail copies upon application to all interested. If you desire a copy, [8] send your address. * * * The late Dr. P. ———

of California, who had important experience with the treatment, stated he relied almost solely on the compound and appropriate diet. Another very successful Physician aided it by prescribing for painful or troublesome symptoms. Both reported good results. * * * But from a large mass of correspondence it seems probable that a great majority of the cases were simply on the Compound and Diet. * * * Patience is necessary, for many professional reports do not begin to record decreasing sugar until after the tenth to fifteenth day, the physical improvement gradually following. Occasionally this is reversed, some reports recording physical improvement before the sugar shows much response. Hence, as above stated, patience is necessary. * * * Mild Cases * * * More Advanced Cases * * * Advanced or Extreme Cases * * * and with same will include instructions for making sugar tests so that changes may be compared. * * * ”

FULTON'S Compound Rx 1—(Bottle label):

“* * * We have received many letters from physicians reporting in cases * * * of * * * Bright's Disease * * * Albuminuria * * * Nephritis, that the use of this Compound was attended with decrease in the albumen in the urine, or improvement in the physical condition of the patient, or both. * * * If stomach is weak take half doses until tone of stomach is improved * * * Write for free copy of the RENAL DIGEST presenting epitomes of many professional reports * * * .”

(Wrapper) “* * * We have received many letters from physicians reporting in cases * * * of * * * Bright’s Disease * * * Albuminuria, * * * Nephritis, that the use of this Compound was attended with decrease in the albumen in the urine, or improvement in the physical condition of the patient, or both * * * .”

(Circular) “* * * We have received many letters from physicians reporting in cases * * * of * * * Bright’s Disease * * * Albuminuria and * * * Nephritis, that the use of this Compound was attended with decrease in Albumen in the urine, or improvement in the physical condition of the patient, or both. We mailed copies of the RENAL DIGEST containing epitomes of several hundred of these reports, with ingredients and Rationale, to the physicians of the United States and will mail copies upon application to all interested * * * Where the heart is involved or there is dropsy and the patient is on helpful heart treatment, elimination or tonics it is common practice to advise continuance of same with the Compound until no longer necessary. * * * The late Dr. P. ——— of California who had important experiences with this treatment, stated he relied almost solely on the compound and appropriate diet. Another very successful physician aided it by prescribing for the most troublesome symptoms. Both reported good results. * * * But from a large mass of correspondence it seems probable that a great majority of the cases were simply on the Compound and diet.

Patience is necessary for many professional reports do not begin to record decreasing albumen until after the tenth to fifteenth days, the physical improvement gradually following. Occasionally this is reversed, some reports recording physical improvement before the albumen shows much response. Hence as above stated, patience is necessary. Directions. Mild Cases * * * More Advanced [9] Cases * * * Advanced or Extreme Cases * * * If stomach is too weak take half doses in a little hot water till full dose can be taken. * * * Test For Albumen Simple formula for making quantitative tests for albumen, so the changes may be compared, will be mailed free on application. John J. Fulton Co., 88 First St., San Francisco, Cal."

This consignment is subject to seizure and confiscation under section 10 of the Act. The Department requests its immediate seizure. Please wire the action taken.

Very truly yours,
(Sgd.) C. V. MARVIN,
Acting Secretary.

[Endorsed]: Filed Aug. 1, 1928. [10]

[Title of Court and Cause.]

CLAIM.

To the Honorable JEREMIAH NETERER, Judge
of the District Court of the United States, for
said District:

Comes now Donald G. Graham and respectfully states and represents that he is one of the proctors for John J. Fulton Co., a corporation, duly created and existing under and by virtue of the laws of the State of ———; that the said corporation is the consignor of the bottles referred to in the libel heretofore filed in the above-entitled proceeding, and is the agent for Stewart & Holmes Drug Company of Seattle, the owner of said bottles, and is duly authorized to make this claim for and on behalf of said Stewart & Holmes Drug Company of Seattle; that said Stewart & Holmes Drug Company, by and through its duly authorized agent, John J. Fulton Co., a corporation, claims the said property as owner thereof, and prays that the same may be delivered to said John J. Fulton Co., for said owner.

That this claim is made by the proctor for said John J. Fulton Co., for the reason that there is no officer or agent of said John J. Fulton Co., now present in the Western District of Washington, or in the State of Washington.

DONALD G. GRAHAM,
For John J. Fulton Co. [11]

Western District of Washington,
State of Washington,
County of King,—ss.

Donald G. Graham, being first duly sworn on oath, deposes and says: That the facts stated in the foregoing claim are true to the best of his knowledge, information and belief.

DONALD G. GRAHAM.

Subscribed and sworn to before me this 6th day of September, 1928.

[Seal]

EMORY E. HESS,
Notary Public in and for the State of Washington,
Residing at Seattle.

Received a copy of the within claim this 6 day of Sept., 1928.

ANTHONY SAVAGE,
Attorney for Libellant.

[Endorsed]: Filed Sep. 7, 1928. [12]

[Title of Court and Cause.]

MOTION FOR ORDER ALLOWING WITH-
DRAWAL OF ANSWER.

Comes now John J. Fulton Co., intervenor herein, and respectfully moves the Court for an order allowing the withdrawal of the answer heretofore filed on August 28, 1928, by said John J. Fulton Co., said withdrawal for the purpose of filing claim and exceptions on behalf of said John J. Fulton Co.

A. P. BLACK,
DONALD G. GRAHAM,
Proctors for John J. Fulton Co.

Received a copy of the within motion this 6 day of Sept., 1928.

ANTHONY SAVAGE,
Attorney for Libellant.

[Endorsed]: Filed Sep. 7, 1928. [13]

[Title of Court and Cause.]

ORDER ALLOWING WITHDRAWAL OF ANSWER.

Upon motion of Donald G. Graham, proctor for John J. Fulton Co., intervenor and claimant, it appearing that the answer heretofore filed by John J. Fulton Co. was filed inadvertently and that said John J. Fulton Co., desires to file exceptions to the libel, now, therefore,

IT IS HEREBY ORDERED that the answer heretofore filed in the above-entitled proceeding may be withdrawn by John J. Fulton Co., and the Clerk of the above-entitled court is hereby authorized to deliver said answer to the proctors for said claimant, said withdrawal for the purpose of filing claim and exceptions to the libel.

Done in open court this 7 day of September, 1928.

JEREMIAH NETERER,
Judge.

O. K.—D. SPAULDING,
Asst. U. S. Attorney.

[Endorsed]: Filed Sep. 7, 1928. [14]

[Title of Court and Cause.]

EXCEPTIONS TO LIBEL.

To the Honorable JEREMIAH NETERER, Judge
of the District Court of the United States, in
and for said District:

John J. Fulton Co., claimant herein, excepts to the libel heretofore filed in the above-entitled proceeding, on the ground that said libel fails to state facts sufficient to constitute a cause of action, and does not disclose any valid claim or lien upon the property referred to in said libel, in all which particulars the said libel is imperfect and insufficient, and claimant prays that said libel may be dismissed.

A. P. BLACK,
DONALD G. GRAHAM,
Proctor for Claimant.

Received a copy of the within exceptions this 6 day of Sept., 1928.

ANTHONY SAVAGE,
Attorney for Libellant.

[Endorsed]: Filed Sep. 7, 1928. [15]

[Title of Court and Cause.]

HEARING ON EXCEPTIONS TO LIBEL.

Now, on this 10th day of September, 1928, this cause comes on for hearing on exceptions to libel and the same are sustained.

Journal No. 16, at page 279. [16]

[Title of Court and Cause.]

ORDER SUSTAINING EXCEPTIONS TO
LIBEL.

The above-entitled proceeding coming on to be heard on the 10th day of September, 1928, on the exceptions filed to the libel by John J. Fulton Co., and argument being had upon said exceptions,

IT IS HEREBY ORDERED, that the exceptions of John J. Fulton Co., intervenor and claimant herein, to the libel be, and the same are hereby sustained, on the ground and for the reason that the allegations of said libel do not constitute misbranding under the Food and Drugs Act, to all of which libelant excepts and its exceptions are allowed.

Libelant is granted 7 days to amend.

Done in open court this 10 day of September, 1928.

JEREMIAH NETERER,
Judge.

O. K.—D. SPAULDING,
Asst. U. S. Attorney.

[Endorsed]: Filed Sep. 10, 1929. [17]

[Title of Court and Cause.]

PETITION FOR REHEARING ON EXCEP-
TIONS TO LIBEL.

Comes now the United States of America, by

Anthony Savage, United States Attorney for the Western District of Washington, and David Spaulding, Assistant United States Attorney for said District, and respectfully petitions the Court to grant a rehearing in the above-entitled matter on the following grounds: That the Court erred in sustaining claimant's exceptions to the libel filed in the above-entitled proceedings.

I.

That the following cases were not called to the attention of the Court and, therefore, a proper consideration of the matter was not had at the time of the hearing—

United States vs. 95 Barrels of Vinegar, 265 U. S. 438, wherein the Supreme Court of the United States in dealing with a case of misbranding under the Federal Food and Drugs Act said: [18]

The statute is plain and direct. Its comprehensive terms contain every statement, design and device which may mislead or deceive. Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity; as well as from statements which are false. It is not difficult to choose statements, designs and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably

to the accomplishment of the purpose of the Act. Citing U. S. vs. Schider, 246 U. S. 519, 522; U. S. vs. Lexington Milling Company, 232 U. S. 399, 409; U. S. vs. Antikamnia Company, 231 U. S. 654, 665. (Underscoring supplied.)

If it is the aim of the statute to prevent impressions resulting from indirection and ambiguity, it may be conservatively said that the statements in question in the instant case are clearly within the statute.

In *Washington Post Company vs. Chaloner*, 250 U. S. 290, the Supreme Court had before it for consideration the question as to the libelous character of a publication in a newspaper. The language of the publication was susceptible of two interpretations, one harmless and the other actionable. The trial Court had instructed the jury that the language was actionable *per se* and the question before the Supreme Court was the correctness of this instruction. The Court approved the rule previously declared by the Circuit Court of Appeals, 6th Circuit, through Judge Lurton (afterwards Mr. Justice Lurton of the Supreme Court), in *Commercial Publishing Company vs. Smith*, 149 Fed. 704, 706, 707:

A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. So the whole item including display lines should be read and construed together, and its meaning and signification thus determined. When thus read if its

meaning is so unambiguous as to reasonably bear but one interpretation, it is for the Judge to say whether that signification is defamatory or not. If, on the other hand, it is capable of two meanings, one of which would be libelous and actionable and the other not, it is for [19] the jury to say, under all the circumstances surrounding its publication, including extrinsic facts admissible in evidence, which of the two meanings would be attributed to it by those to whom it is addressed or by whom it may be read. Citing *Peck vs. Tribune Company*, 214 U. S. 185, 190.

In *Baker vs. Warner*, 231 U. S. 588, 594, the rule is stated as follows:

Where the words are libelous *per se* the Judge can so instruct the jury leaving to them only the determination of the amount of damages. Where the words are not libelous *per se* and, in the light of the intrinsic facts averred could not possibly be construed to have a defamatory meaning, the Judge can dismiss the declaration on demurrer, or, during the trial, may withdraw the case from the jury. But there is a middle ground where though the words are not libelous *per se*, yet, in the light of the intrinsic facts averred, they are susceptible of being construed as having a defamatory meaning. Whether they have such import is a question of fact.

The rule has been followed in the recent cases of *E. I. Du Pont De Nemours & Company vs. Nash-*

ville Banner Publishing Company (C. C. A. 6th Circuit), 12 Fed. (2d) 231; Du Pont Engineering Company vs. Nashville Banner Publishing Company (D. C. M. D. Tenn.), 13 Fed. (2d) 186, and Kraft vs. New York Herald Company (D. C. S. D. N. Y.) 6 Fed. (2d) 644.

Reason and logic prompt the assertion that the rule applied in the foregoing libel cases should be followed in determining what does or does not constitute a therapeutic claim on a drug label, and it should have been left to a jury to determine the meaning of the label and wrapper in question.

A case very closely in point to the instant case is Bradley vs. United States (C. C. A. 6th Circuit), 264 Fed. 79. In that case Bradley had been shipping in interstate commerce a preparation bearing the following statements on the label: "Recommended in the treatment of Bright's disease, Diabetes, Dropsy, [20] Cystitis, Gout, Rheumatism, Indigestion, Kidney and Bladder trouble," etc., "directions * * * ." A consignment of the product was seized by process of libel, charging that the aforesaid statements on the label were false and fraudulent. Bradley intervened as claimant and excepted to the libel:

(1) That the libel does not disclose that the waters contained in the bottles are misbranded because the label does not claim that the waters contained any ingredients or substances for the cure for any human ailment.

(2) The label described in the libel does not

pretend that the waters contain medical agents effective as a remedy for human disease.

(3) That the labels set out in the libel do not amount in law to a misbranding.

The exceptions were overruled and the cause went to trial before a jury who returned a verdict in favor of the Government, upon which a judgment was entered condemning the product. The errors assigned in the Circuit Court of Appeals were as follows:

(1) The Court erred in failing to sustain exceptions to the libel.

(2) The Court erred in refusing to instruct the jury to find a verdict for the claimant.

(3) The Court erred in refusing the charge that the label on the bottles of water did not violate the Act of Congress, in that the said label made no statement regarding the therapeutic or curative effect of such waters.

(4) The Court erred in refusing to grant a new trial.

Concerning these assignments of error, the Circuit Court of Appeals for the 5th Circuit said:

(1) The first and third assignments raise the same question of law: Does the label as set out in the libel bear the interpretation sought to be placed on it by the Government; i. e., that the words, "Recommended in the treatment of" the diseases named, properly construed, mean that the said water had a curative or therapeutic quality? If the Court could say that they did not have this meaning, then it should

have sustained the exceptions and given the charge asked. If it could not, then no [21] error was committed in overruling the exception and refusing to give the charge. The construction of the language used in the label was in the first instance for the Court; the falsity or truth and the intent of the claimant were for the jury to find from the testimony before it.

(2) It seems to us that words, "Recommended in the treatment of Bright's disease," etc., "Directions * * *"—could only mean that the use of the water in the treatment of the diseases named would effect a cure or alleviation of such diseases; otherwise, why recommend it? Unless this means that the water did contain elements or ingredients which would alleviate or cure the diseases named, when taken according to the directions thereon contained, it was a waste of printer's ink. Would not anyone suffering from any one of the diseases named understand that by the taking of the water his ailment would be alleviated or cured by reason of the ingredients contained in the water? It seems to us that he would. Treatment would only be taken with a view to alleviation or cure, and a water possessing elements or ingredients favorable to that end only would be recommended.

We think this label clearly susceptible of this construction, and that no error was committed, either in overruling the exception or refusing the charge.

It is true that the use of the words "Recommended in the treatment of Bright's disease," etc., "Directions * * * " is more of a literal therapeutic claim than a statement on the labels that the manufacturer has received letters from doctors to the effect that they have used the preparation successfully in the treatment of disease. The latter form, however, is merely another way of saying that the product is recommended in the treatment of the named diseases. It is merely an application of the truism spoken by Mr. Justice Butler in *U. S. vs. 95 Barrels Vinegar, supra*: "Deception may result from the use of statements not technically false or which may be literally true," and as further said by Judge Call in the Bradley case, unless the statement means that the [22] preparation is effective in the mitigation or cure of the diseases named when taken according to directions thereon contained, it is a waste of printer's ink. The manufacturer could have had no other purpose in putting such a statement on his labels, and one suffering from one of the diseases named would derive no other meaning from the context.

Respectfully submitted,

ANTHONY SAVAGE,

United States Attorney.

DAVID SPAULDING,

Assistant United States Attorney.

Received copy of within petition this 5th day of Oct., 1928.

HOWE & GRAHAM,
Attorneys for Respondent.

[Endorsed]: Filed Oct. 5, 1928. [23]

[Title of Court and Cause.]

DECISION DENYING PETITION FOR
REHEARING ON EXCEPTIONS TO
LIBEL.

Anthony Savage, Esq., U. S. District Attorney,
David Spaulding, Esq., Asst. U. S. Dist. Atty.,
Proctors for Libelant.

A. P. Black, Esq., Howe & Graham, Proctors for
Respondent.

NETERER, District Judge.—The petition for
rehearing is denied.

NETERER,
U. S. District Judge.

[Endorsed]: Filed Oct. 29, 1928. [24]

[Title of Court and Cause.]

ORDER OF DISMISSAL.

Upon motion of claimant herein, it appearing that the exceptions to the libel of information have heretofore been sustained and the time having expired for libelant to file an amended libel,

IT IS HEREBY ORDERED that the libel of information be, and it is hereby dismissed, and the United States Marshal is hereby ordered and directed to deliver to the claimant herein the articles heretofore seized and embraced within said libel of information.

Done in open court this 7th day of November, 1928.

JEREMIAH NETERER,

Judge.

O. K. as to form.

D. SPAULDING,

Asst. U. S. Attorney.

Exception noted and allowed.

[Endorsed]: Filed Nov. 7, 1928. [25]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To John J. Fulton Co., Claimant, and A. P. Black,
and Howe & Graham, Proctors for Claimant:

You, and each of you, will please take notice that the United States of America, libelant in the above-entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order sustaining exceptions to libel, and order of dismissal made, entered and filed on the tenth

day of October and the seventh day of November, 1928, respectively.

ANTHONY SAVAGE,

United States Attorney.

HAMLET P. DODD,

Assistant United States Attorney.

Received copy of within notice this 17 day of Jan., 1929.

HOWE & GRAHAM,

Attorneys for Respondent Claimant.

[Endorsed]: Filed Jan. 21, 1929. [26]

[Title of Court and Cause.]

PETITION FOR APPEAL.

The above-named libelant, feeling itself aggrieved by the order of dismissal, order sustaining exceptions, and order overruling motion for rehearing, entered on October 10, and November 7, 1928, respectively, does hereby appeal from the said orders and each and every part thereof, to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors herein, and said libelant prays that its appeal be allowed and citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said orders were based, duly authenticated, be sent to the United States Circuit Court

of Appeals for the Ninth Circuit, as by the rules of said court in such cases made and provided.

ANTHONY SAVAGE,

United States Attorney.

HAMLET P. DODD,

Assistant United States Attorney.

[Endorsed]: Filed Jan. 21, 1929. [27]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the United States of America, libellant, in the above-entitled action, by its proctors, Anthony Savage, United States Attorney for the Western District of Washington, and Hamlet P. Dodd, Assistant United States Attorney for the same District, Northern Division, and says that in the records and proceedings in said cause in the order sustaining exceptions to libel, and order of dismissal entered therein, there is manifest error in the following particulars:

I.

The Court erred in this: In signing an order sustaining exceptions to the libel; to which libellant took exception at the time.

II.

The Court erred in this: In signing an order denying a petition for rehearing on exceptions to [28] the libel; to which libellant took exceptions at the time.

III.

The Court erred in this: In signing an order of dismissal of said libel in said cause; to which libelant took exception at the time.

ANTHONY SAVAGE,
United States Attorney.

HAMLET P. DODD,
Assistant United States Attorney.

Received copy of within assign. this 17th day of
Jan., 1929.

HOWE & GRAHAM,
Attorneys for Claimant.

[Endorsed]: Filed Jan. 21, 1929. [29]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

On the application of the libelant herein, IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of dismissal hereto entered and filed on the 7th day of November, 1928, be, and the same is hereby allowed.

IT IS FURTHER ORDERED that an apostle on appeal of the record, testimony, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 21 day of January, 1929.

JEREMIAH NETERER,
United States District Judge.

Received copy of within order this 17th day of
Jan., 1929.

HOWE & GRAHAM,
Attorneys for Claimant.

[Endorsed]: Filed Jan. 21, 1929. [30]

[Title of Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL.

To the Clerk of the Above-entitled Court:

You will please prepare apostles on appeal of
the above-entitled action to contain the following:

Libel of information.

Claim.

Motion to withdraw answer.

Exceptions to libel.

Order withdrawing answer.

Record of the hearing on the exceptions to libel.

Order sustaining exceptions.

Petition for rehearing on exceptions.

Memorandum of the Court's decision on the peti-
tion for rehearing.

Order of dismissal.

Petition for appeal.

Assignments of error.

Order allowing appeal.

Citation on appeal.

Notice of appeal.

Praecipe.

Clerk's certificate to transcript of record.

HAMLET P. DODD,
Asst. United States Atty.

[Endorsed]: Filed Jan. 21, 1929. [31]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO APOSTLES ON APPEAL.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 31, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the apostles on appeal herein, in the above-entitled cause, from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees

and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [32]

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 67 folios, at 15¢	\$10.05
Certificate of Clerk to Apostles on Appeal, with seal50
<hr/>	
Total	\$10.55

I hereby certify that the above cost for preparing and certifying record, amounting to \$10.55 will be included as constructive charges against the United States in my quarterly account to the Government of fees and emoluments for the quarter ending March 31, 1929.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 31 day of January, 1929.

[Seal]

ED. M. LAKIN,
Clerk, United States District Court, Western District of Washington.

By S. E. Leitch,
Deputy. [33]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,
Western District of Washington,
Northern Division,—ss.

The President of the United States, to John J.
Fulton Co., Claimant, and A. P. Black, and
Howe & Graham, Proctors for Claimant.

You, and each of you, are hereby cited and admonished to appear in the United States Circuit Court of Appeals to be held at the city of San Francisco, California, in the Ninth Judicial Circuit on the —— day of ———, 1929, pursuant to an order allowing appeal from the final order of dismissal signed and filed on the 7th day of November, 1928, wherein the United States is libelant, and 48 Bottles, more or less, of an article of drugs labeled in part “Fulton’s Compound RX 1,” and 24 Bottles, more or less, of an article of drugs labeled in part “Fulton’s Compound RX 2,” respondent, and John J. [34] Fulton Co., claimant, to show cause, if any there be, why the judgment against the libelant entered herein should not be corrected, and why justice should not be done to the parties in that behalf.

WITNESSETH the Honorable JEREMIAH E. NETERER, United States District Judge for the Western District of Washington, Northern Division, this 21st day of Jan., A. D. 1929.

[Seal]

JEREMIAH NETERER,
United States District Judge.

Received a copy of the within citation this 17th day of Jan., 1929.

HOWE & GRAHAM,
Attorneys for Claimant. [35]

[Endorsed]: Filed Jan. 21, 1929. [36]

[Endorsed]: No. 5709. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. John J. Fulton Co., a Corporation, Claimant of 48 Bottles, More or Less, of an Article of Drugs Labeled in Part "Fulton's Compound RX 1," and 24 Bottles, More or Less, of an Article of Drugs Labeled in Part "Fulton's Compound RX 2," Shipped by the John J. Fulton Company, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed February 4, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.